(2)

Supreme Court, U.S.
FILED
FEB 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1165

In The

Supreme Court of the United States

October Term, 1988

COUNTY OF SONOMA,

Petitioner,

vs.

JOHN S. HERRINGTON, DAVID S. HERRINGTON, QUAIL HILL RANCH, a Partnership,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

SIDEMAN & BANCROFT
A Partnership of Professional Corporations

BY: FREDERIK A. JACOBSEN
One Embarcadero Center
8th Floor
San Francisco, CA 94111
(415) 392-1960

Counsel for Respondents John S. Herrington, David S. Herrington and Quail Hill Ranch Partnership

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

STATEMENT OF THE CASE 1

I. THE NATURE OF PROPERTY OWNERS' ALLEGATIONS 1

II. THE INITIAL DEVELOPMENT PROPOSALS 2

III. THE ENVIRONMENTAL STUDIES CONDUCTED AND FINALIZATION OF THE SUBDIVISION 4

IV. THE FORMAL SUBDIVISION APPLICATION 6

REASONS FOR DENYING THE WRIT:

I. A WRIT OF CERTIORARI SHOULD NOT ISSUE MERELY TO REVIEW FACTUAL DISPUTES RESOLVED AGAINST THE COUNTY BY A JURY AND REVIEWED BY THE NINTH CIRCUIT APPLYING THIS COURT'S DECISIONS 7

II. THE EVIDENCE OF COUNTY MISCONDUCT, INCLUDING THE BOARD OF SUPERVISORS, SUPPORTED THE NINTH CIRCUIT'S AFFIRMANCE OF LIABILITY 7

III. THE COUNTY'S FAILURE TO COMPLY WITH RULE 50(B) BY RENEWING A MOTION FOR DIRECTED VERDICT DID NOT ALTER THE EVIDENCE WHICH SUPPORTED THE VERDICT OF LIABILITY 13

IV. THE NINTH CIRCUIT PROPERLY APPLIED THIS COURT'S DECISIONS ON RIPENESS. THE COUNTY'S OWN DAMAGES EVIDENCE AT TRIAL BELIES ITS CLAIM THAT DAMAGES CANNOT BE ASCERTAINED 15

V. THERE WAS NO BASIS FOR DISQUALIFICATION OF THE TRIAL COURT JUDGE 17

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

City of St. Louis v. Praprotnik, 108 S.Ct. 915 (1988) 9, 10

Gilbert v. City of Little Rock, 722 F.2d 1390 (8th Cir. 1983) 20

Heritage Homes v. Seekonk Water District, 648 F.2d 761 (1st Cir. 1981); *aff'd on reh'g* (except for punitive damages) 690 F.2d 1 (1982); *cert. denied*, 454 U.S. 807 (1982) 16

McKinley v. City of Eloy, 705 F.2d 1110 (9th Cir. 1983) 10

Monell v. Department of Social Services, 436 U.S. 658 (1978) 9, 10, 13

Scott v. Greenville County, 716 F.2d 1409 (4th Cir. 1983) 16

Superintendent v. Hill, 472 U.S. 445 (1985) 7

United States v. Johnson, 268 U.S. 220 (1925) 7

United States v. 47.14 Acres of Land, More or Less, 674 F.2d 722 (8th Cir. 1984) 16

United States v. 428.02 Acres of Land, 687 F.2d 266 (8th Cir. 1982) 16

RULE

Supreme Court Rule 34.1(d)(e) 1

Supreme Court Rule 34.2 1

Supreme Court Rule 50(b) 13, 15

STATEMENT OF THE CASE[1]

The Ninth Circuit in this action applied established precedent of this Court to the particular facts of the case. For this reason, review by this Court is unnecessary because the Petition involves only questions of sufficiency of the evidence. The Petition either omits or misstates the evidence supporting the Ninth Circuit's decision. Thus Respondents (hereafter "Property Owners") will address these omissions and misstatements of the trial record before addressing in more detail the reasons why a grant of certiorari is inappropriate in this action.

I. The Nature of Property Owners' Allegations

The Petition mischaracterizes the gravamen of Property Owners' theory of liability when it refers to the "takings" claim as their "major claim" for relief (Petition, p. 4). To the contrary, Property Owners' action was principally based on Due Process and Equal Protection theories, arising from Petitioner's course of conduct which included:

- misrepresentations concerning the proposed subdivision by a member of the Board of Supervisors to a committee delegated to make findings concerning the subdivision;
- the Board of Supervisors forcing Property Owners' property into an agricultural preserve which,

---

[1]Respondents are satisfied with Petitioner's statements concerning *Jurisdiction* and *Constitutional and Statutory Provisions Involved* (Pet., pp. 2-3). Accordingly, this Brief in Opposition does not repeat that information. Supreme Court Rules, Rule 34.1(d), (e); Rule 34.2.

under State Law, could only be achieved with Property Owners' consent;

- misrepresentations of material fact in planning staff reports that were presented to and affirmed by the Board of Supervisors;
- the Board of Supervisors' knowledge and participation in the planning staff's alteration of a critical document (to the detriment of Property Owners) which was presented to a committee delegated by the Board of Supervisors to make findings concerning the subdivision;
- the Board of Supervisors' prohibition of the residential use of Property Owners' property in disregard of studies demonstrating that the property could not be profitably used for agriculture;
- the Board of Supervisors' adoption of a regulation that permanently placed Property Owners' property in agricultural use without providing Property Owners a hearing on that drastic change in use.

II. The Initial Development Proposals

Beginning in 1976, the Property Owners approached the County planning staff with a series of proposals to develop the subject property. RT II 32-33; III 6.[2] The parties stipulated at trial that the Property Owners had

---

[2]Respondents owned approximately 540 acres of land in west Sonoma County (hereafter the "subject property"). Reporter's Transcript (hereafter "R.T.") Vol. II, p. 25 (hereafter "II 25").

made every reasonable effort to farm the subject property profitably. RT II 44. As the stipulation reflects, Property Owners were unable to make a profit from farming. Surrounded on the north, west, and east by rural residences, the subject property was ideally suited for rural (five to twenty acre lot sizes) residential development. RT III 26; Tr.Ex. 51.

The Petition erroneously asserts that Property Owners "never submitted any development proposal to the County other than the 32-unit proposal" and "never sought determination of how many units would be acceptable." (Petition, p. 5).

To the contrary, Property Owners pursued for three years every avenue available to them to obtain a residential use for their property. In an effort to develop the subject in an environmentally sensitive manner, Property Owners contacted the County planning staff in 1976 to create a development plan that would provide an economically viable use and that was also compatible with County land-use policies. RT II 46; Tr.Ex. 9, 10.

The planning staff recommended a local architect as the most environmentally sensitive architect in the area, and whose work had met with previous County approval. RT II 52-53. Property Owners hired this architect. RT II 53.

The architect prepared a 103-unit residential proposal for the subject property (five acre average lot size), a density that was within the density allowed by existing zoning. RT II 54. When the planning staff recommended a lower density, Property Owners had the plans redrawn to 73 units, and later to 48 residential units. RT II 56-60.

Over the course of the next several years, the County changed its position several times concerning the land use for the subject property. The County wavered between residential use and visitor use (in the form of second homes and a hotel). Property Owners responded each time by redesigning and resubmitting their project design. RT II 56-64; IV 115.

During these development discussions from 1976 to 1978, the County was preparing its General Plan. After Property Owners had submitted the above-described plans for development, the County instructed Property Owners to delay filing a formal subdivision application until the General Plan had been adopted. RT II 60; III 6-7. The County also informed Property Owners that their residential development would be integrated into the General Plan. RT II 60; III 7-8.

In January 1978, the County adopted its General Plan. Tr.Ex. 1. The General Plan set a maximum density of 35 units on the subject property, much lower than Property Owners were entitled to and lower than they had been led to believe. Nonetheless, Property Owners again redesigned a development plan to conform to this adopted density range.

III. The Environmental Studies Conducted and Finalization of the Subdivision

In the year following enactment of the General Plan, the County further delayed Property Owners' with *seriatim* requests for environmental studies. After Property Owners would comply with one request, the County would demand another, previously unmentioned, study. Ultimately, Property Owners satisfied each of these demands by hiring, at the County's direction:

- An expert geologist, who concluded that the subject property had stable buildable areas for the proposed development. RT II 87-88, 90-94, 135; Tr.Ex. 3, 4, 5;
- Water experts who conducted certified drilling tests on the subject property and proved that water was available for the proposed development and septic percolation presented no problem. RT II 87-88, 90-94; X 134; Tr.Ex. 3, 4, 5, 21;
- A soils scientist who concluded that the subject property's soils were not suitable for commercial timber. RT II 101, III 259-60; Tr.Ex. 7;
- A forestry expert who concluded that timber harvesting was not an economically-viable use for the property. RT II 96; Tr.Ex. 7.

The experts' written reports containing these conclusions were transmitted to the County. RT II 88, 91-92, 95-98.

The County *never* commissioned or obtained reports by other experts which contradicted Property Owners' experts' conclusions.

With respect to subdivision design, the County recommended that Property Owners *hire a County staff member* to design the placement of the proposed lots on the subject property. RT II 61. The County represented to Property Owners that this staff member (Gary Mann) was familiar with the policies of the General Plan, and could therefore design a subdivision that would satisfy those policies. RT II 61-62; III 10-11. Property Owners hired Mann. Tr.Ex. 2, 60.

After meetings between Property Owners and the County's staff (including Mann) in 1978 to discuss the appropriate density, Mann prepared a development plan which placed 35 lots on the subject property. RT II 67; Tr.Ex. 60. This 35-lot plan was ultimately utilized as the blueprint for the formal application for a 32-lot subdivision.

IV. The Formal Subdivision Application

In May, 1979, Property Owners filed a formal application to subdivide the subject property. The subdivision map accompanying the application requested a density of 32 residential lots. Tr.Ex. 9, 10. The subdivision:

- Preserved in perpetuity over 300 acres of the subject property in open space. RT II, 118-119;
- Located all of the proposed residences out of sight of the Bohemian Highway. RT II 117-118;
- Preserved in perpetuity a 35-acre redwood grove. RT II 116-117;
- Set aside for agriculture approximately 90 acres of inferior agricultural land previously used to raise oat hay (unprofitably). RT II 119; III 206;
- Provided for equestrian/hiking trails and other amenities. Tr.Ex. 9.

———o———

REASONS FOR DENYING THE WRIT

I. A WRIT OF CERTIORARI SHOULD NOT ISSUE MERELY TO REVIEW FACTUAL DISPUTES RESOLVED AGAINST THE COUNTY BY A JURY AND REVIEWED BY THE NINTH CIRCUIT APPLYING THIS COURT'S DECISIONS

The Petition attempts to transform this Court into a trier of fact. Each issue raised in the Petition is inextricably linked to the evidence adduced at trial, and cannot be resolved without resort to a weighing of that evidence. The factual dependency of each issue is discussed below under separate headings. This Court "[does] not grant a certiorari to review evidence and discuss specific facts." *Superintendent v. Hill,* 472 U.S. 445, 460-461 (1985), quoting *United States v. Johnson,* 268 U.S. 220, 227 (1925).

Moreover, the Ninth Circuit affirmed the jury's verdict of liability by applying the decisions of this Court to the evidence at trial. A writ of certiorari is unnecessary where, as here, the opinion below conforms to this Court's decisions.

II. THE EVIDENCE OF COUNTY MISCONDUCT, INCLUDING THE BOARD OF SUPERVISORS, SUPPORTED THE NINTH CIRCUIT'S AFFIRMANCE OF LIABILITY

Quite understandably, the County attempts to ignore the misconduct of the Board of Supervisors which was introduced into evidence. The Petition erroneously asserts that the Property Owners' "case against the County was built upon their complaints that two county planners had treated them inconsistently and rudely . . . and that another county planner had removed four brief paragraphs

from respondents' five-page written description of their project . . ." (Petition, p. 8).

The Petition fails to inform this Court of the following evidence at trial:

- County ordinances compelled a property owner in Sonoma County to seek the planning staff's review of all subdivision applications (Tr.Ex. 65, 67);
- TheBoard of Supervisors *delegated* to an agricultural committee the authority to make findings on the agricultural productivity of the subject property (Tr.Ex. 34);
- A member of the Board of Supervisors attended the agricultural committee hearing at which the planning staff presented altered evidence (RT III 51, 60)[3];
- A member of the Board was present at the agricultural committee hearing at which the planning staff presented altered evidence (RT III 51, 60)[3];
- That same Supervisor made a lengthy and inaccurate denunciation of the Property Owners' subdivision at the agricultural committee hearing to which the Property Owners were not permitted to respond (RT II 150; III 73-75);

---

[3]The Petition's description of this alteration as "trivial" (pp. 8-9) is misleading. The County planning staff deleted from the Property Owners' project description *only* those portions which related to the agricultural issues to be addressed by the committee. For example, the planning staff deleted the portion of the document which set forth the fact that approximately 300 of the 540 acres would be permanently preseved in open space and agricultural use. The doctored document was distributed to the Board of Supervisors member in attendance. (Tr.Ex. 9, 35 (doctored version); R.T. III 51,60)

- The written "findings" of the agricultural committee (Tr.Ex. 36) were not only tainted by these irregularities, they were completely false[4];
- The Board of Supervisors member who testified at trial for the County conceded that the Board of Supervisors *adopted* these tainted findings in denying Property Owners subdivision and downzoning the subject property to 100-acre minimum lots (RT IX 30-31).

The County's attempt to escape liability on the ground that "junior" planning officials could not bind the County ignores the above-cited evidence and was raised for *the first time* on appeal before the Ninth Circuit. The Petition disingenuously asserts that the County "moved for judgment n.o.v. at the close of trial, C.R. 199, and raised these questions [referring to the *Praprotnik* issue] on appeal." (Petition, p. 9). Nowhere in the County's brief in support of its motion for judgment n.o.v. (C.R. 201) does the County assert as error this issue. Likewise, the notice of motion cited in the Petition (C.R. 199) does not raise the issue. It was revised for the first time on appeal.

This Court's decision in *City of St. Louis v. Praprotnik*, 108 S.Ct. 915 (1988) did not introduce the legal principle that Section 1983 liability must be based upon governmental policy, as distinct from isolated and unauthorized acts of municipal employees. *Monell v. Department of Social Services*, 436 U.S. 658 (1978) established that principle long before the trial in this action. Two years before the

---

[4]A detailed analysis of the falsity of the "findings" is contained in Property Owners Reply Brief before the Ninth Circuit, Statement of Facts, Section III.E., pp. 12-13.

trial, the Ninth Circuit recognized that *Monell* required a showing that the acts of a public official must represent official policy before Section 1983 liability can be imposed. *McKinley v. City of Eloy*, 705 F.2d 1110, 1116 (9th Cir. 1983).

The County's failure to raise *Monell* as a defense at trial (the County failed to request a jury instruction on the issue) or as a ground for new trial is not surprising in light of the trial evidence showing the intimate involvement by the Board of Supervisors itself in the County's unconstitutional conduct.[5]

The County seeks certiorari on the erroneous ground that the Ninth Circuit "did not even address, let alone follow, the *Praprotnik decision*." (Petition, p. 10). To the contrary, the Ninth Circuit responded to the County's belated use of this defense by holding: "The jury found the County to be responsible for the misdeeds in question. We cannot conclude that the Herringtons' evidence provided no support . . ." 834 F.2d at 1501.

The Ninth Circuit's rejection of the County's argument was a correct application of *Praprotnik* (as well as *Monell* and later cases). In *Praprotnik*, the municipal policymakers (the City Council) were never given an opportunity to review the decision of which plaintiff complained. The *Praprotnik* decision noted that the case would be entirely different if "the authorized policymakers approve a subordinate's decision and the basis for

---

[5]The Petition's claim that the District Court would have ordered a new trial if it had "foresee[n] this Court's ruling in *Praprotnik*" (p. 13) is specious in light of the County's failure to raise the issue in its motion for judgment n.o.v.

it'' (108 S.Ct. at 926), or if a particular decision by a subordinate was ''expressly approved by the supervising policymakers'' (*Id.* at 827).

Here, the County's Board of Supervisors delegated functions to the planning staff as well as to the agricultural committee. A member of the Board of Supervisors actively participated in the tainted agricultural committee hearing (RT II 1250; III 73-75). The tainted findings of the committee were transmitted to the Board of Supervisors (Tr.Ex. 36). The Board of Supervisors adopted those findings (RT IX 30-31).

The following chronology, omitted from the Petition, demonstrates the intimate involvement of the Board of Supervisors in the County's unconstitutional course of conduct:

- On November 13, 1979, the consistency issue was heard by the Board of Supervisors. The *Board of Supervisors* then closed the public hearing (Tr. Ex. 31).
- The Board of Supervisors did not decide the consistency issue on November 13. Instead, the Board of Supervisors delegated the matter to the agricultural committee (Tr.Ex. 34).
- The agricultural committee was convened on November 28, 1979, at which time the alteration of evidence occurred and a member of the Board of Supervisors made an inaccurate denunciation of the project to which Property Owners were denied the opportunity to respond (RT II 149-150; III 73-75).

- On November 29, 1979, the agricultural committee transmitted its "findings" to the Board of Supervisors (Tr.Ex. 36).

- On December 11, 1979, the Board of Supervisors reconvened to decide the consistency issue, at which hearing the Board of Supervisors denied Property Owners' subdivision application. *Because the public hearing had been closed on November 13, Property Owners were not permitted to speak at the December 11 hearing.*

- At the end of the December 11 hearing (at midnight, several hours after denial of Property Owners' application), with *no notice* given to Property Owners, the Board of Supervisors proposed to downzone the subject property to 100-acre minimum lots (RT II 153-154).

- On March 4, 1980, the Board of Supervisors heard the proposal to downzone the subject property. The Board of Supervisors gave *no notice* to Property Owners of the hearing (Property Owners received notice of the hearing from a third party) (RT II 157).

- At the March 4 hearing, the Board of Supervisors voted to downzone the subject property. The Board of Supervisors denied Property Owners the right to speak or make any sort of presentation at the hearing (RT II 158; III 92). Moreover, the Board of Supervisors denied Property Owners the opportunity to respond to inaccurate and misleading comments made by the Supervisors at the hearing. *Id.*

The Ninth Circuit was thus justified in upholding liability under *Monell* and its progeny. As the above chronology demonstrates, the Board of Supervisors played an active and decisive role in depriving Property Owners of their constitutional rights. Certiorari is unnecessary to further review the Ninth Circuit's review of the sufficiency of the evidence supporting the verdict.

III. THE COUNTY'S FAILURE TO COMPLY WITH RULE 50(B) BY RENEWING A MOTION FOR DIRECTED VERDICT DID NOT ALTER THE EVIDENCE WHICH SUPPORTED THE VERDICT OF LIABILITY

The Petition mischaracterizes the Ninth Circuit's opinion by alleging that the Ninth Circuit treated the County's failure to comply with Rule 50(b) as "determinative of the County's section 1983 liability" (Petition, p. 12). While it is true that the Ninth Circuit refused to relieve the County of its obligation to comply with Rule 50(b), the Ninth Circuit nonetheless proceeded to review in detail all of the evidence supporting the verdict.

The County's assertion that the Ninth Circuit was "skeptical of the remainder of respondents' case" (Petition, p. 12) simply misreads the Ninth Circuit's opinion. In actuality, the Ninth Circuit held that there was "little difficulty in concluding that evidence was presented to support a finding of liability pursuant to the Herringtons' procedural due process claim." 834 F.2d at 1505. The Ninth Circuit reviewed the evidence supporting the substantive due process claim and found it compelling. *Id.* at 1506.

The Ninth Circuit noted that it was "skeptical" only concerning the evidence presented on the equal protection claim. Ironically, the County failed to challenge the evidence concerning the equal protection violation in its motion for directed verdict at the close of Property Owners' case-in-chief (RT VII 3-7). This failure is perhaps explained by the substance of Property Owners' evidence on the equal protection claim, which included expert analysis of the applications, planning staff reports, subdivision maps, environmental data, physical features and Board of Supervisors resolutions concerning other subdivisions which were approved by the Board shortly after Property Owners' application was denied.[6] The salient features of that evidence included:

- The other approved major subdivisions were governed by the *same* General Plan policies (including agricultural policies) that were used to deny Property Owners' application;
- One of the subdivisions bordered the subject property;
- A member of the Board of Supervisors conceded at trial that his opposition to Property Owners' development was based upon "political" reasons (RT VIII 130-131; IX 23-25);
- The other subdivision owners were represented by Michael Morrison, the planner who denied Prop-

---

[6]A detailed analysis of the evidence supporting the equal protection claim is contained in Property Owners' Reply Brief before the Ninth Circuit at pp. 27-28.

> erty Owners (who resided outside the County) before going into private practice to lobby for local owners.

Although the Ninth Circuit expressed its skepticism that "*no* meaningful differences" existed between the subject property and the other approved subdivisions, the Ninth Circuit acknowledged that Property Owners "did supply evidence that no such differences existed." 834 F.2d at 1501.

The County's failure to comply with Rule 50(b) did not change the nature of the evidence which proved the violation of Property Owners' constitutional rights. Certiorari is therefore unnecessary to further review this same evidence.

IV. THE NINTH CIRCUIT PROPERLY APPLIED THIS COURT'S DECISIONS ON RIPENESS. THE COUNTY'S OWN DAMAGES EVIDENCE AT TRIAL BELIES ITS CLAIM THAT DAMAGES CANNOT BE ASCERTAINED.

At the trial of this action, the County *never* objected to Property Owners' damages evidence on grounds that it now asserts in the Petition at pp. 15-18. This is not surprising given that the County itself presented evidence through an appraiser of the damages which it claimed Property Owners suffered. In fact, the County's own appraiser employed virtually the same methodology as Property Owners' appraiser, although he reached different value conclusions (RT IX 106-109; Defendant' Tr.Ex. AA-8). The jury chose to believe Property Owners' damages evidence.

The Petition quotes the Ninth Circuit out of context in its citation to the phrase that "the trial court may well be at sea in its attempt to fix damages." (Petition, p. 15, quoting from 834 F.2d at 1506, n. 23). What the Petition fails to include in its citation is the Ninth Circuit's detailed analysis of a measure of damages based upon the "before-and-after" value of the subject property. 834 F.2d at 1506, n. 23. Thus, while not limiting the trial court to this measure of damages, the Ninth Circuit has certainly not left the trial court or the parties without concrete guidance concerning a method by which to fix damages.

The County's own appraiser employed a "before-and-after" valuation approach at trial (RT IX 106 *et seq.*). This methodology is nothing new, and has been approved for decades by the American Institute of Real Estate Appraisers. Numerous federal cases have consistently upheld comparable sales data of the type introduced in this action as proper evidence of changes in value. *See, e.g., United States v. 47.14 Acres of Land, More or Less*, 674 F.2d 722, 725 (8th Cir. 1984); *United States v. 428.02 Acres of Land*, 687 F.2d 266, 271 (8th Cir. 1982). Likewise, the award of damages for lost profits in section 1983 land-use cases is not a novel concept. *E.g., Heritage Homes of Attleboro v. Seekonk Water District*, 648 F.2d 761 (1st Cir. 1981); *aff'd on reh'g* (except for punitive damages award), 690 F.2d 1 (1982); *cert. denied*, 454 U.S. 807 (1982). As the Fourth Circuit observed in *Scott v. Greenville County*, 716 F.2d 1409, 1424-1425 (4th Cir. 1983) (a section 1983 land-use case):

> . . . a developer's economic interest in profits flowing from successful completion of a housing development is not too highly speculative to merit judicial protection.

Property Owners' Reply Brief before the Ninth Circuit collects some of the numerous cases analyzing damages under section 1983 (*see* Reply Brief, p. 36, fn. 43). Those authorities will not be repeated here. Suffice it to say that section 1983 litigants frequently recover lost profits and other economic losses, proof of which may depend on making future projections. That these estimates of economic loss may be based upon projections or deductions from market data does not make them inadmissibly speculative, and federal courts have consistently so held.

The County's own final actions established the parameters for the damages analysis. A member of the Board of Supervisors testified at trial that the intent of the final downzoning of the subject property was to take away the residential development of the property (RT IX 37, lines 16-18). Both County and Property Owners' appraisers discovered abundant market data of comparable sales to assess "before" and "after" values. This Court's further review of the damages evidence would therefore be an unproductive use of its discretionary docket.

V. THERE WAS NO BASIS FOR DISQUALIFICATION OF THE TRIAL COURT JUDGE

The Petition conveniently omits to mention the most telling fact on the issue of the trial court judge's alleged bias. Before trial of this action, Judge Weigel effectively terminated Property Owners' case in federal court, forcing

Property Owners to appeal to the Ninth Circuit to obtain reinstatement of their case.[7]

The Petition fails to explain why a judge supposedly biased against the County would throw Property Owners out of court on a patently erroneous legal ground.

Moreover, the record at trial concerning Judge Weigel's alleged bias was scrutinized by another district court judge when the County raised the issue in its motion for new trial. The district court judge who denied the motion for new trial made the following finding:

> "I have read the transcript. It is apparent that Judge Weigel was an active participant in the trial process. He did examine witnesses, cross-examine witnesses, argue with counsel, make points of law, make suggestions and generally as an active judge wants to do, kind of push and shove the case along a little bit, however, always towards the end of truth and justice. I don't believe that Judge Weigel's interference in that process was anything more than fair and unbiased. I don't believe there's any indication of bias for the plaintiff and against the defendant or even vice-versa. On the whole, I think his conduct at the trial was even-handed and fair to both sides." C.R. 229, p. 55.

The Ninth Circuit also exhaustively reviewed the alleged evidence of Judge Weigel's bias, and summarily rejected the County's allegations. The evidence of Judge Weigel's even-handed treatment of both sides and lack of any other

---

[7]See Order Staying Case (C.R. 26) which was vigorously opposed by Property Owners (C.R. 27, 32, 33, 35, 38, 39, and 41). Property Owners' appeal to the Ninth Circuit is set forth at C.R. 55, and the Ninth Circuit's summary reversal of Judge Weigel is contained in C.R. 55. After Property Owners returned before Judge Weigel, he attempted to have their case dismissed for alleged nonprosecution (C.R. 58).

disqualifying evidence is catalogued in Property Owners Reply Brief (at pp. 38-47) before the Ninth Circuit, and will not be repeated here. However, two egregious factual misstatements in the Petition must be addressed.

Throughout its unseemly assault on Judge Weigel's fairness, the County alleges that Judge Weigel had a "dispute" with the County concerning the property owned by the judge and sold eight years before trial. (*see, e.g.* the heading for Section IV of the Petition, p. 18, which refers to a "dispute"). Judge Weigel engaged a lawyer to investigate the County's planning treatment of his former property to facilitate the sale of the property. As Judge Weigel's lawyer testified in a post-trial deposition taken by the County, the lawyer was retained only to inform Judge Weigel of the status of the planning activities concerning the property (C.R. 158, Vol. I, 4-6, 10).[8] Judge Weigel ultimately sold his property at a substantial profit. Most importantly, the sale occurred *eight* years before the trial of this action.

The Petition also quotes out of context Judge Weigel's post-trial statement of bias against the County's attorney. In that post-trial proceeding, Judge Weigel made it abun-

---

[8]The Petition alleges that Judge Weigel retained the attorney to "forestall or foreclose the downzoning." (p. 19) The Petition does not provide a citation to the record because this allegation is a complete fabrication. The newspaper article quoted in the Petition (pp. 20-21) shows on its face that it is based on "county representations." It is not surprising that a local newspaper would be misled into an incorrect conclusion about Judge Weigel's alleged bias given the County's misrepresentations concerning the nature of Judge Weigel's property ownership.

dantly clear that he harbored no bias against the County. Judge Weigel stated that he had become prejudiced against the County's attorney due to factual misrepresentations made by the attorney in the post-trial motion to disqualify the judge (*See* Order of January 17, 1988, C.R. 161). After the judge lost faith in the integrity of the County's counsel, he properly recused himself. Judge Weigel's understandable distaste for the tactics of counsel, however, arose only after trial. As such, it is not a basis for disqualification. *Gilbert v. City of Little Rock*, 722 F.2d 1390, 1398-99 (8th Cir. 1983).

———o———

CONCLUSION

For the reasons given, Property Owners respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

SIDEMAN & BANCROFT
A Partnership of Professional Corporations

BY: FREDERIK A. JACOBSEN

Counsel for Respondents John Herrington, David S. Herrington and Quail Hill Ranch Partnership

Date: February 20, 1989